

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM F. MUNCK
Claimant

VS.

STATE OF KANSAS
Respondent
Self-Insured

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Docket No. 225,269

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Bryce D. Benedict on June 25, 1999. The Appeals Board heard oral argument November 16, 1999.

APPEARANCES

Frank D. Taff of Topeka, Kansas, appeared on behalf of claimant. Robert E. North of Topeka, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record listed in the Award and in addition has considered the transcript of the proceedings relating to the scheduled deposition of Susan Bolyard. The Board has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant has a 13 percent disability based on functional impairment. Claimant contends he is permanently and totally disabled. The difference depends on whether claimant has refused to attempt appropriate accommodated employment offered by respondent. Claimant also contends that even if the award is limited to functional impairment, Dr. Joseph G. Sankoorikal, the only physician who testified to impairment, adjusted the rating to 17 percent if based on the *AMA Guides to the Evaluation of Permanent Impairment*. Claimant also argues that the ALJ erroneously excluded evidence relating to claimant's average weekly wage and erroneously failed to sanction defense counsel for failing to appear at a deposition. Respondent argues the Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be affirmed.

Findings of Fact

1. Claimant, who is himself nearly blind, worked for the State's Services for the Blind as a Business Enterprise Program Field Supervisor. In that position, he supervised the vending facilities. The duties included moving vending machines.
2. Claimant injured his shoulder and neck June 25 through June 27, 1997, while moving vending machines in the course of his duties for respondent.
3. Claimant treated initially with his family physician, Dr. Jeffrey P. Rhoads, who referred claimant to Dr. Michael T. McCoy. In addition, respondent sent claimant to Dr. Samir Desai and Dr. Desai agreed with the referral to Dr. McCoy. Dr. McCoy referred claimant to Dr. Wade Welch. After claimant underwent an MRI, Dr. McCoy and Dr. Welch referred claimant to Dr. Michael L. Smith.
4. Claimant returned to light duty late December 1997 and then left work in February 1998. According to claimant, Dr. McCoy had told him to take off work if his neck bothered him. Claimant has not returned to work since February 9, 1998.
5. Claimant underwent surgery to his neck, performed by Dr. John D. Ebeling, March 9, 1998. The surgery consisted of a discectomy and fusion at C4-5, C5-6.
6. Mr. David Wright, claimant's supervisor, described claimant's job duties and testified about respondent's willingness to accommodate claimant's work restrictions. According to Mr. Wright, claimant contacted vending facility managers to determine their need for technical assistance and to assure the quality of their performance, claimant developed new opportunities, specifically a new opportunity with the Environmental Protection Agency, and claimant also prepared reports and provided training. Claimant contacted others primarily by phone. Claimant occasionally used a computer to do a memo or other document. Claimant spent approximately 85 percent of his day on the phone and spent 5 to 10 percent of his day reading.

Mr. Wright testified respondent was willing to accommodate claimant's restrictions after the injury and surgery. Mr. Wright told claimant respondent was willing to make accommodation and discussed with claimant the duties claimant could and could not do. Mr. Wright also wrote claimant offering to make accommodations such as using a clothesline to hang blueprints for claimant to read. Respondent had provided a headset for telephone work. Claimant did not accept the offer for accommodated work and did not suggest any further accommodation.

7. Respondent presented testimony from Mr. Bruce Tomlinson who had conducted surveillance of claimant. Mr. Tomlinson presented videotape showing claimant on one occasion using a weedeater, sweeping the sidewalk with a broom, repairing the porch railing, and crawling under the porch. Video on a separate date shows claimant packing boxes, lifting boxes, taking down a table, lifting a box over his shoulder, and generally cleaning up after a yard sale.

8. Dr. Rhoads treated claimant beginning July 10, 1997, for complaints of neck and right shoulder pain. Dr. Rhoads testified that based on the history claimant gave, the condition was work related. Dr. Rhoads followed claimant until sometime after claimant's surgery. Dr. Rhoads gave no specific restrictions but opined that claimant is totally disabled because of the combination of blindness and neck injury. He ruled out any activity which would require neck movement.

9. Dr. Sankoorikal, a physiatrist, saw claimant at Dr. Ebeling's request, to begin conditioning and pain management. Dr. Sankoorikal continued to treat claimant through August 1998 when he recommended restrictions limiting claimant to medium-type work. He concluded claimant could use a phone for a period of time, could dictate correspondence, and could ride in a vehicle for a short ride. He rated the impairment as 13 percent of the whole person.

On cross examination, Dr. Sankoorikal acknowledged the rating would be 17 percent based on the *AMA Guides* if you use, in part, the range of motion findings from his exam. He also testified, however, he did not feel these were entirely accurate. Taking his testimony as a whole, it appears clear his rating was 13 percent and he considered the 13 percent to be based on the *Guides*.

10. Respondent's counsel failed to appear at a scheduled deposition in this case, and claimant's counsel requests sanctions. Respondent's counsel explained that the failure was due to an inadvertent scheduling error on his part. The scheduled witness also did not appear and did not testify to support certain wage records claimant's counsel seeks to introduce into evidence.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1996 Supp. 44-501(a).

2. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. The Board finds respondent would have provided appropriate accommodated employment at a comparable wage. Claimant refused to attempt such work and the award should be limited to functional impairment only. *Foulk v. Colonial Terrace*, *supra*; K.S.A. 44-510e. The Board so finds for the reasons stated in the Award by the ALJ. The Board adopts those reasons as its own.

5. K.S.A. 44-510e provides that functional impairment is to be based on the AMA *Guides to the Evaluation of Permanent Impairment*. In this case, the only evidence of what the impairment would be based on the *Guides* is the testimony of Dr. Sankoorikal that the rating would be 13 percent.

6. The Board finds claimant has a permanent partial general disability of 13 percent.

7. The Board concludes the failure of respondent's counsel to appear at the deposition of Susan Bolyard was due to excusable neglect and denies claimant's request for sanctions.

8. The Board agrees with the ALJ's conclusion that claimant's average weekly wage was, based on claimant's testimony, sufficient for the maximum weekly payment and issues relating to introduction of the wage records are moot.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict on June 25, 1999, should be, and the same is hereby, affirmed.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Taff, Topeka, KS
Robert E. North, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director